In the Supreme Court

OF THE

United States

Supreme Court, U. S.
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OCTOBER TERM, 1940

No. 531

JOHN DEMARTINI CO., INC. (a corporation), EDWARD L. KAHN, doing business under the name and style of Edw. L. Kahn & Co., and P. LERNER COMPANY, LTD. (a corporation),

Petitioners,

vs.

THE AMERICAN STEAMER MAUI, her engines, boilers, tackle, apparel, and furniture, and MATSON NAVIGATION COMPANY (a corporation),

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit,
and
BRIEF IN SUPPORT THEREOF.

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No.

JOHN DEMARTINI CO., INC. (a corporation), EDWARD L. KAHN, doing business under the name and style of Edw. L. Kahn & Co., and P. LERNER COMPANY, LTD. (a corporation),

Petitioners,

vs.

THE AMERICAN STEAMER MAUI, her engines, boilers, tackle, apparel, and furniture, and MATSON NAVIGATION COMPANY (a corporation),

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petition of John Demartini Co. Inc., a corporation, Edward L. Kahn, an individual doing business under the

name and style of Edw. L. Kahn & Co., and P. Lerner Company, Ltd., a corporation, for a writ of certiorari to review a decree of the United States Circuit Court of Appeals for the Ninth Circuit sitting in admiralty respectfully shows to this Honorable Court:

A.

STATEMENT OF MATTER INVOLVED.

Petitioners filed libels in admiralty against respondent to recover for damages to shipments of cargo while in its custody as a common carrier by water (R. 3).

On October 26 and 27, 1936, petitioners shipped on board respondent's steamer MAUI, a common carrier, at San Francisco, California, a large quantity of perishable cargo, consisting of fresh fruits and vegetables, in good order and condition for transportation to ports in the Hawaiian Islands (R. 67).

The vessel was scheduled to sail from San Francisco at noon on October 27th, on her voyage which would ordinarily take seven days (R. 67, 210). On that date, at about 3 P. M., the ship left her dock with petitioners' cargo aboard and proceeded out into San Francisco Bay, where she anchored (R. 215, 243). The vessel remained at such anchorage from October 27, 1936, to February 5, 1937 (R. 67).

During such interval of time, petitioners' cargo by reason of its inherent nature deteriorated. Part of the cargo was dumped during the time the ship lay at anchor and the remainder was discharged from the vessel when she returned to her dock on February 5, 1937 (R. 67).

The unlicensed deck crew of the MAUI, consisting of 12 seamen, had left her a few hours before she sailed from

her dock (R. 212, 253). Her unlicensed engine-room crew, consisting of 21 men, left the vessel after her lines were cast off (R. 225, 243, 343). The vessel's required crew consisted of 53 men, including officers (R. 212). She was, therefore, short 33 men as she proceeded out from her dock to anchorage.

The vessel was dispatched from her dock by respondent's operating manager for the two-fold purpose of loading a cargo of dynamite at the explosives anchorage in the bay and to facilitate securing a crew (R. 351). There was testimony that if the ship were out in the bay, the crew could not leave so readily—a mild form of shanghaiing (R. 153-154).

After midnight on the morning of October 30, 1936, a strike of maritime labor occurred which lasted until February 5, 1937 (R. 193-194).

Petitioners pleaded the failure of respondents to perform the contract of carriage. They also alleged that the ship, after being loaded, commenced her voyage but later anchored in the bay, whereupon petitioners made unavailable demands for the discharge of their goods when informed that the vessel could not proceed on her voyage (R. 3).

Respondent, in its answer, admitted the failure to carry the cargo to destination, the damage to the cargo and the failure to discharge the cargo as demanded, but set up as defenses that the damage was due to the inherent nature of the goods and to delay and detention caused by strikes and labor troubles, causes for which respondent claimed exemption under the provisions of the bills of lading (R. 16, 483).

As stated in the Court's opinion, *Respondent introduced no evidence whatever, and there is no evidence in the record, to show that the MAUI was in any respect seaworthy when she received petitioners' cargo, or when she left her dock, or at any time here involved, or that due diligence to that end had ever been exercised* (R. 486).

The District Court wrote no opinion but made findings that the damage was due to the inherent nature of the goods becoming operative during the delay and detention caused by strikes and labor troubles, causes from which respondent was exempt from liability under its bills of lading (Finding XI, XIII and XVII, R. 432). The District Court thereupon entered a decree dismissing the libels (R. 447).

The Circuit Court of Appeals affirmed the decree and findings of the District Court (R. 482). In its opinion the Circuit Court of Appeals specifically ruled that respondent did not have to prove that its vessel was seaworthy or that due diligence to make her so had been exercised in order to rely upon its bill of lading exemptions from liability (R. 486). The Court further ruled that the vessel was not unseaworthy by reason of her lack of a full crew when she proceeded from her dock to the powder anchorage in the bay (R. 488).

The Circuit Court of Appeals states in its opinion that "The general maritime strike commencing in October, 1936, and raging for more than three months thereafter, provides the background of the litigation" (R. 483). The Court, therefore, apparently believed that such condition in some way lessened the obligations of a common carrier by water to carry safely and care for the cargo of ship-

pers established by a host of decisions by this Court and other Circuit Courts of Appeal. Are the legal rights of petitioners, who are shippers of cargo, any the less because the carrier who has custody of their goods becomes engaged in strife with its employees? A carrier who relies on a bill of lading exception against "strikes" is neither legally nor morally entitled to greater consideration than a carrier who relies on an exception against "perils of the sea". A carrier may, and frequently does, contribute to the onset of a strike, but even a strike-provoking carrier does not create a peril of the sea.

B.

JURISDICTION OF THIS COURT.

1. Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stats. 938, 28 U. S. Code, Section 347(a) to review a decree of the United States Circuit Court of Appeals for the Ninth Circuit.

2. The decree which petitioners seek to have this Court review was dated and entered August 2, 1940 (R. 489). A petition for rehearing was thereafter duly filed and said petition for rehearing was denied by order dated and entered on September 20, 1940 (R. 490).

3. This is a suit in admiralty for breach of a contract of affreightment commenced in the United States District Court for the Northern District of California (R. 3, 428). The District Court had original jurisdiction of such cause pursuant to the United States Constitution, Article

III, Section 2(1) and by virtue of Section 24(3) of the Judicial Code (U. S. Code, Title 28, Section 41(3).

Morewood v. Enequist, 64 U. S. 491, 16 L. Ed. 516;
Krauss Bros. Lumber Co. v. Dimon S. S. Corp., 290 U. S. 117, 122, 78 L. Ed. 216, 219.

4. An appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit pursuant to Section 128(a), First, of the Judicial Code, amended, U. S. Code, Title 28, Section 225(a), First.

C.

QUESTIONS PRESENTED.

1. Can a common carrier by water who is subject to the provisions of the Harter Act* rely upon exceptions in its bill of lading to exempt itself from prima facie liability for damage to cargo without first proving that it had exercised due diligence to make its vessel in all respects seaworthy, or if such diligence was not exercised, that unseaworthiness did not contribute to the damage?

2. Can a common carrier by water, who is subject to the provisions of the Harter Act, rely upon an unconditional exception in its bill of lading, without proof of the exercise of due diligence to make its vessel in all respects seaworthy, to exempt itself from liability for a cause of damage to cargo for which exemption is granted under the third section of the Harter Act only upon the express condition that it shall have exercised due diligence to make its vessel in all respects seaworthy? In other words,

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*Printed in full on pages i-ii of the appendix hereto.

can a carrier avoid the condition of an exemption provided for by the Harter Act by inserting an unconditional exemption against the same cause of damage in its bill of lading?

3. Is a vessel which is navigated without a full crew, contrary to the provisions of a statute* of the United States (46 U. S. Code, Section 222, Revised Statutes, Sections 4463, as amended by Act of May 11, 1918, Chapter 72, Section 1, 40 Stat. 548) unseaworthy?

(a) Can a shipowner who navigates his vessel in violation of said statute escape liability for damage to cargo carried on such vessel without proof that such statutory violation could not have contributed to the damage?

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals that a common carrier may rely upon bill of lading exceptions to exempt it from liability for damage to cargo without first proving the exercise of due diligence to make its vessel in all respects seaworthy is in direct conflict with the following decisions in which such proof was held to be essential:

(a) *Decisions of this Court:*

Martin v. The Southwark, 191 U.S. 1, 12, 48 L. Ed. 65, 71;

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*Printed in full on page 33 of the annexed Brief.

Bradley Fertilizer Co. v. The Edwin I. Morrison, 153 U.S. 199, 211, 38 L. Ed. 688, 692.

(b) *Decisions by other Circuit Courts of Appeals:*

The Benjamin Noble, 244 Fed. 95, 98 (6 C.C.A.);

The Skipsea, 9 Fed. (2d) 887, 888 (2 C.C.A.);

The Thomas P. Beal, 11 Fed. (2d) 49, 51 (3 C.C.A.);

Atlantic Gulf & West Indies S. S. Line v. Interocean Oil Co., 31 Fed. (2d) 1006 (4 C.C.A.).

(c) *Decisions by District Courts:*

Kaufer v. Luckenbach S. S. Co., 284 Fed. 160, 161 and 294 Fed. 978, 981 (W.D. Wash.);

Cafiero & Mencacci v. Navigazione Libera Triestina, 50 Fed. (2d) 199, 202 (E.D.N.Y.);

American Co. v. U. S., 26 Fed. (2d) 468, 469 (S.D.N.Y.);

The Benjamin Noble, 232 Fed. 382, 389 (E.D. Mich.);

The Cornelia, 15 Fed. (2d) 245, 247 (S.D.N.Y.);

The Agwimoon, 24 Fed. (2d) 864, 867 (D.C. Md.);

The Poznan, 276 Fed. 418, 431 (S.D.N.Y.);

The Kensington, 88 Fed. 331, 333 (S.D.N.Y.).

2. The decision of the Circuit Court of Appeals that a common carrier may, without proof of due diligence to make its vessel in all respects seaworthy, rely upon an unconditional exception in its bill of lading to exempt itself from liability for a cause of damage for which exemption is granted under the third section of the Harter Act only upon the express condition that such proof of due diligence be affirmatively shown, is in direct conflict with the decision of this Honorable Court in *Martin v. The Southwark,* 191 U.S. 1, 48 L. Ed. 65.

3. The decision of the Circuit Court of Appeals that a vessel which is navigated without her full required complement of crew contrary to a statute of the United States is not unseaworthy and that the carrier is not liable for damage to cargo although it failed to prove that such statutory violation could not have contributed to the damage is in conflict with the following decisions of this Honorable Court and the decisions of other Circuit Courts of Appeal:

(a) *Decisions of this Court:*

Richelieu & Ontario Nav. Co. v. Boston Marine Ins. Co., 136 U.S. 408, 422, 34 L. Ed. 398, 403;

Lie v. San Francisco & P. S. Co., 243 U.S. 291, 298, 61 L. Ed. 726, 733.

(b) *Decisions by Circuit Courts of Appeal:*

The New York Marine No. 10, 109 Fed. (2d) 564, 566 (2 C.C.A.);

The Denali, 105 Fed. (2d) 413, 418, 420, on rehearing, 112 Fed. (2d) 952, 954 (9 C.C.A.).

4. The decision of the Circuit Court of Appeals places a burden of proof upon the cargo owner to prove facts which are within the knowledge of the carrier but which are not within the knowledge of the cargo owner, contrary to the decision of this Honorable Court in *Schnell v. The Vallescura,* 293 U.S. 296, 304, 79 L. Ed. 373, 377.

5. The decision in this case as to burden of proof is not one applicable merely to a particular contract or to the circumstance of this case alone. The same questions, as to the carrier's burden of proof, will arise in countless cases where transportation is governed by the Harter Act. It is essential, as frequently recognized by this Court,

that there be a uniformity of decision in Courts of Admiralty.

Chelentis v. Luckenbach S. S. Co., 247 U.S. 372, 382, 62 L. Ed. 1171, 1176;

May v. Hamburg-American Line, 290 U.S. 333, 352, 78 L. Ed. 348, 356.

Wherefore, your petitioners respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and proceedings in the above-entitled cause, and that said decree may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as may seem meet and just.

Dated, San Francisco, California,
October 23, 1940.

JOHN DEMARTINI CO., INC.
(a corporation),
EDWARD L. KAHN, doing business under the name and style of Edw. L. Kahn & Co.,
P. LERNER COMPANY, LTD.
(a corporation),
By S. HASKET DERBY,
JOSEPH C. SHARP,
Counsel for Petitioners.

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Petitioners,

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THE AMERICAN STEAMER MAUI, her engines, boilers, tackle, apparel, and furniture, and MATSON NAVIGATION COMPANY (a corporation),

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals is reported in *The Maui*, 113 Fed. (2d) 1018. The opinion also ap-

pears at pages 482-488 of the record. The District Court rendered no opinion, but the Findings of Fact signed by it appear on pages 428-446 of the record.

II.

JURISDICTION OF THIS COURT.

A full statement of the jurisdiction of this Court has been given under heading "B" in the foregoing Petition, page 5, supra, and, in the interest of brevity, is not repeated at this point.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under heading "A" in the foregoing Petition, page 2, supra, and, in the interest of brevity, is not repeated at this point.

IV.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Ninth Circuit erred in the following particulars:

1. In holding that respondent was exempt from liability for damage to petitioners' cargo by virtue of bill of lading exceptions against damage due to detention, delay, prolongation and strikes, although respondent failed to prove that it had exercised due diligence to make

the MAUI in all respects seaworthy or that any unseaworthiness did not contribute to the damage, as required by the applicable law.

2. In holding that respondent was exempt from liability for damage to petitioners' cargo by virtue of a bill of lading exemption against damage due to the inherent vice or nature of the goods, although respondent failed to prove that it had exercised due diligence to make the MAUI in all respects seaworthy, as required by the applicable law.

3. In holding that the MAUI was not unseaworthy although she was navigated without her full required crew, contrary to a federal statute, 46 U.S. Code, Section 222, Revised Statutes, Section 4463, as amended.

4. In holding that respondent was not liable to petitioners for the damage to their cargo although respondent failed to prove that its violation of a federal statute, 46 U.S. Code, Section 222, Revised Statutes, Section 4463, as amended, could not have contributed to the damage, as required by the applicable law.

5. In failing to render and enter a decree in favor of petitioners and against respondent for the amount of their damages, interest and costs.

V.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

Point A. The decision of the Circuit Court of Appeals that a common carrier may rely upon bill of lading exceptions to exempt itself from liability for damage to cargo without first proving the exercise of due diligence to make its vessel in all respects seaworthy, or that unseaworthiness did not cause the damage, is in direct conflict with decisions of this Court and of other Circuit Courts of Appeal in which such proof was held to be essential.

Point B. The decision of the Circuit Court of Appeals that a common carrier may, without proof of due diligence to make its vessel in all respects seaworthy, rely upon an unconditional exception in its bill of lading to exempt itself from liability for a cause of damage to cargo for which exemption is granted under the third section of the Harter Act only upon the express condition that such diligence be exercised, is in conflict with a decision of this Court.

Point C. The decision of the Circuit Court of Appeals that a vessel which is navigated without her full crew, contrary to a statute of the United States, is not unseaworthy, and that the carrier is not liable for damage to cargo although it failed to prove that such statutory violation could not have contributed to the damage, is in conflict with decisions of this Court and other Circuit Courts of Appeal.

POINT A.

THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT A COMMON CARRIER MAY RELY UPON BILL OF LADING EXCEPTIONS TO EXEMPT ITSELF FROM LIABILITY FOR DAMAGE TO CARGO WITHOUT FIRST PROVING THE EXERCISE OF DUE DILIGENCE TO MAKE ITS VESSEL IN ALL RESPECTS SEAWORTHY, OR THAT UNSEAWORTHINESS DID NOT CAUSE THE DAMAGE, IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUIT COURTS OF APPEAL IN WHICH SUCH PROOF WAS HELD TO BE ESSENTIAL.

It is established law that proof by a cargo owner that his goods were received by the carrier in good order and condition and delivered in bad condition or not delivered at all makes out a prima facie case of liability against the carrier.

> *The Folmina,* 212 U.S. 354, 361, 53 L. Ed. 546, 550;
> *Schnell v. The Vallescura,* 293 U.S. 296, 303, 79 L. Ed. 373, 377.

It follows, and it is equally well established, that the carrier has the burden to prove that the loss was due to a cause for which it may validly exempt itself from liability by law or by contract.

> *Schnell v. The Vallescura,* supra, page 304.

In the case at bar, the carrier relies exclusively upon exceptions contained in its bills of lading to exempt itself from liability (R. 19, 483).

Respondent does not dispute the foregoing statements of law. But it contends that if it shows that the loss was apparently due to a cause for which exemption from liability is granted by its bill of lading, the carrier is exonerated from liability unless the cargo owner can prove

that the loss was in reality due to the carrier's negligence. In proving that the loss was apparently due to a contractually excepted cause, respondent claims that it need not prove that it had exercised due diligence to make its vessel seaworthy or that any lack of such diligence did not contribute to the damage. On the other hand, petitioners contend that the carrier must prove, as an *element* in showing that the loss was due to an excepted cause, that due diligence had been exercised to make the vessel in all respects seaworthy, or, if there was failure of such diligence in any material particular, that such failure did not contribute to the damage.

As stated in the opinion there is no evidence in the record that the MAUI was in any respect seaworthy or that due diligence had been exercised to make her seaworthy (R. 486).

1. Conflict of Decisions.

The Circuit Court of Appeals held herein as follows (R. 486):

> "Although they have not suggested any item of unseaworthiness — aside from lack of crew — which might be thought contributory to the loss, appellants contend that before a bill of lading exemption is available to appellee it must first prove that the MAUI was in all respects seaworthy, or that due diligence had been exercised to make her so. The rule is said to be established by Martin v. The Southwark, 191 U.S. 1, and other decisions cited, most of which are by the lower federal courts. We think otherwise."

The Circuit Court of Appeals thus apparently concedes that its ruling creates a conflict with other decisions. In

Martin v. The Southwark, 191 U.S. 1, 48 L. Ed. 65, the shipper filed a libel for damage to a cargo of fresh meat, shipped under refrigeration, which had arrived at destination in a rotting and deteriorated condition due to breakdown of machinery. The bill of lading excused the carrier from liability for loss, delay, or damage, however arising, including all risks of breakdown of machinery. The carrier contended that in view of the fact that the cause of damage was excepted by the bill of lading, the shipper could not recover unless negligence on the part of the carrier was proved. The District Court and Circuit Court of Appeals sustained the contention of the carrier. This Court in reversing the lower Courts said, page 12:

> "In the District Court, which judgment was affirmed by the Circuit Court of Appeals, it was held that the burden of proof, in view of the stipulation of the bill of lading in this case, was not upon the carrier, but upon the shipper and that there could only be a recovery in the event that the shipper had shown, by satisfactory evidence, negligence upon the part of the carrier. This case was decided before the opinion was delivered in the case of *International Nav. Co. v. Farr,* 181 U.S. 218; 45 L. Ed. 830, and upon this point is in direct opposition thereto, and fails to give proper weight to the provisions of the act making it incumbent upon the carrier to use due diligence to provide a seaworthy vessel."

This Court had, even prior to *Martin v. The Southwark,* supra, stated the same rule. In *Bradley Fertilizer Co. v. The Edwin I. Morrison,* 153 U.S. 199, 211, 38 L. Ed. 688, 692, the Court said:

> "Perils of the sea were excepted by the charter-party, but the burden of proof was on the respond-

ents to show that the vessel was in good condition and suitable for the voyage at its inception, and the exception did not exonerate them from liability for loss or damage from one of those perils to which their negligence, or that of their servants contributed."

Negligence was not proved, but the carrier was held liable because its proof of seaworthiness was not satisfactory. Other Circuit Courts of Appeal have held the carrier must prove seaworthiness or due diligence to rely on a bill of lading exception.

In *The Thomas P. Beal,* 11 Fed. (2d) 49, 51 (3 C.C.A.), the carrier relied on a bill of lading exception against leakage, and the Court said:

> "When sued by a shipper for damage to cargo, the ship (or a time charterer) cannot rely alone upon an exception in the contract of affreightment but, before availing itself of the exception, must sustain the burden of proving its primary obligation of seaworthiness in stowing the cargo in a berth reasonably fitted for cargo of that kind."

In *The Benjamin Noble,* 244 Fed. 95, 98 (6 C.C.A.), affirmed 249 U.S. 334, the Circuit Court of Appeals said, in holding that the carrier had the burden of proof to establish the exercise of due diligence to make its vessel seaworthy:

> "* * * The fact that the bill of lading contained a provision excepting 'dangers of navigation, fire and collision' is not important. As Mr. Justice Day said in The Southwark, supra, 191 U.S. at pages 16, 17, 24 Sup. Ct. at page 6, 48 L. Ed. 65:

'To permit the stipulations of this bill of lading to cut down the statutory requirements of section 2 of the Harter Act would be to allow the parties to enforce a contract in violation of the positive terms of the statute.' ".

In *The Skipsea,* 9 Fed. (2d) 887, 888 (2 C.C.A.), the Court said:

"The onions having been received by the ship at Valencia in good condition and having been delivered in New York in damaged condition, the burden rests upon the ship to explain this injury and condition, and to excuse itself as an accepted peril of the sea, or that it was free from fault or neglect. The appellee must assume and bear the burden of establishing that the vessel was seaworthy. The Southwark, 191 U.S. 1, 24 Sup. Ct. 1, 48 I. Ed. 65; Kaufer Co. v. Luckenbach S. S. Co. (D.C.) 284 Fed. 160."

There have been many District Court decisions on the point. In *Kaufer Co. v. Luckenbach S. S. Co.,* 294 Fed. 978 (W.D., Wash.), the damage to a shipment of candles was due to heat, a cause of damage exempted by the bill of lading. The shipper proved no negligence on the carrier's part, except a case of prima facie liability. The carrier proved the general seaworthiness of its vessel, but did not prove proper stowage. Judge Neterer stated, page 981:

"The Court also holds that the shipowner must show, among other things, the seaworthy fitness to carry the cargo undertaken, and that the discharge of this duty is not left to any presumption, *and that it is a condition precedent which must be shown before the exemption can be claimed.*

* * * * * * *

"To make a ship seaworthy for the cargo sought to be transported, it must be shown that the relation of the ship to the cargo at the inception of the voyage was such as to make it seaworthy and fit to carry the cargo; not only must the ship be in a general seaworthy condition, properly equipped, and manned, but the cargo must be stowed in such part of the ship as has been generally or specially provided for the particular class of cargo.

• • • • • • •

"Proper stowage at the inception of the voyage not having been shown by the respondent, decree for libelant is directed" (Emphasis supplied).

The same Court, in passing on the pleadings in the same case, held that the carrier must plead seaworthiness before it could rely on bill of lading exemptions from liability, stating (284 Fed. 160):

"It is primer admiralty law that before the exemption is available to the respondent, it must be shown that the vessel was in all respects seaworthy."

In *Cafiero & Mencacci v. Navigazione Libera Triestina*, 50 Fed. (2d) 199, 202 (E.D.N.Y.), the Court held:

"While the burden of proof to show negligence rests upon libelant, yet, *before the respondent can avail itself of exceptions in its contract where merchandise is shown to have been received in good order and condition and delivered in bad order and condition, respondent must show a seaworthy vessel, and that the merchandise was properly stowed in a proper berth.* It must satisfactorily explain these matters. *Such proof cannot be supplied by speculation.* It has been said that a doubt in regard to these matters should be resolved in favor of the shipper" (Emphasis supplied).

In *American Co. v. U. S.*, 26 Fed. (2d) 468, 469 (S.D.N.Y.), the Court said:

> "Respondent argues that there is no obligation whatever upon the shipowner to show that he used due diligence to make the ship '*in all respects* seaworthy' in order to rely upon the exceptions in the bill of lading, as he would otherwise be bound to do when he relies upon the third section of the Harter Act to relieve him from the negligence of the officers in the navigation or management of the ship. Apparently respondent contends that Section 2 of the Harter Act provides for a lesser degree of diligence than that required by Section 3. To my mind, both sections cast the burden on the shipowner to exercise 'due diligence' to make the ship seaworthy. I cannot conceive of varying degrees of due diligence" (Emphasis by Court).

The same rule has been recognized by the California State Courts. In *Blake, Moffitt & Towne v. Steamship Co.*, 120 Cal. App. (Supp.) 775, 779, the Court said:

> "Such damage raised a presumption of unseaworthiness at the beginning of the voyage; and the burden was then cast upon the defendant to show affirmatively that due diligence was used to make the vessel in all respects seaworthy, and that the damage was proximately caused by a peril from the consequences of which defendant was exonerated by the provisions of the bill of lading and the federal statute."

The foregoing authorities establish a very important and direct conflict with the decision in the case at bar. We shall not, therefore, quote from additional decisions. But we do cite the following additional cases which con-

flict with the present decision and insert quotations therefrom in the Appendix, pages iii-v:

The Benjamin Noble, 232 Fed. 382, 389 (E.D., Mich.);

The Kensington, 88 Fed. 331, 333 (S.D.N.Y.);

The Agwimoon, 24 Fed. (2d) 864, 867 (D.C., Md.), affirmed under title *Atlantic Gulf & West Indies S. S. Lines v. Interocean Oil Company,* 31 Fed. (2d) 1006 (4 C.C.A.);

The Poznan, 276 Fed. 418, 431 (S.D.N.Y.);

The Cornelia, 15 Fed. (2d) 245, 247 (S.D.N.Y.).

2. The Reasons for Requiring the Carrier to Prove the Exercise of Due Diligence to Make his Vessel Seaworthy.

There are sound, definite reasons for the rule of proof established by the authorities cited above contrary to the decision of the Circuit Court of Appeals in the present case.

First, there is an implied warranty of seaworthiness in every contract of carriage by water.

Martin v. The Southwark, 191 U.S. 1, 6, 48 L. Ed. 65, 68;

The Carib Prince, 170 U.S. 655, 661, 42 L. Ed. 1181, 1186.

The carrier may by contract reduce this warranty of absolute seaworthiness to the exercise of due diligence to make seaworthy, but cannot avoid the duty to exercise such diligence by bill of lading exception or otherwise because of the express prohibition of Section 2 of the Harter Act (printed in Appendix).

The Carib Prince, supra, page 661.

Section 2 of the Harter Act does not merely prohibit the carrier from relieving itself by contract of the duty to exercise due diligence to make its vessel seaworthy, but it prohibits the carrier from inserting any agreement or covenant in its bill of lading whereby its obligation to exercise such diligence "shall in any wise be *lessened, weakened* or *avoided.*"

Surely, as a mere matter of common sense, if the effect of a bill of lading exception is to exempt the carrier from liability unless the cargo owner can prove that the carrier failed to exercise due diligence to make his ship seaworthy, the *obligation* of exercising such diligence is, to say the least, thereby lessened and weakened.

Martin v. The Southwark, supra, pages 16-17.

Second, the carrier must prove *the* cause, not merely *a* cause, of the damage to the shipper's goods.

Schnell v. The Vallescura, 293 U.S. 296, 306, 79 L. Ed. 373, 378.

For, delay, strikes, inherent nature of the goods, etc., relied upon by respondent herein as bill of lading exceptions, may be due to, or at least become operative, by reason of unseaworthiness or negligence just as well as by reason of causes beyond the carrier's control.

Third, the carrier knows the facts surrounding the loss, among which the fitness of the ship is of paramount importance. The shipper does not have such knowledge, and if he were required to furnish such proof, it would operate as a denial of justice.

Schnell v. The Vallescura, supra, page 304;
The Medea, 179 Fed. 781, 786 (9 C.C.A.).

3. The Reasoning of the Circuit Court of Appeals in the Present Case.

The opinion of the Circuit Court of Appeals herein gives no valid reason for its disagreement with the salutary rule of burden of proof established by this Court and other Circuit Courts of Appeal in the decisions cited above. On the contrary, it is clear that the opinion of the Circuit Court of Appeals is predicated on certain definite misconceptions.

First, the opinion herein states: "Appellee (the carrier) does not invoke the Harter Act (46 U.S.C.A. Secs. 190-192). It is not seeking statutory exoneration but relies on its contracts of affreightment" (R. 487).

Respondent does not, it is true, invoke the Harter Act, but respondent's contracts are *governed* by and *subject* to the provisions of the Harter Act. The very contention quoted above from the opinion was likewise made by the carrier in *Martin v. The Southwark,* 191 U.S. 1, 16, 48 L. Ed. 65, 72. This Court then said:

> "It is argued that appellees are not claiming the benefit of the Harter Act but rely upon the contract in the bill of lading to exempt them from liability in the absence of affirmative proof of negligence.
>
> *"To permit the stipulations of this bill of lading to cut down the statutory requirements of Section 2 of the Harter Act would be to allow the parties to enforce a contract in violation of the positive terms of the statute"* (Emphasis supplied).

The Circuit Court of Appeals thus here holds valid the very contention which this Court has held to be invalid. The Circuit Court of Appeals overlooks the very obvious

fact that a carrier cannot evade the self-executing restrictions and prohibitions of the Harter Act by failing to invoke the Act. The restrictions of Section 2 of the Harter Act are not optional. The carrier is bound thereby whether it invokes the Act or not. The prohibitions therein contained are prohibitions imposed by law on the exemptions which the carrier can claim by contract. If, as already pointed out, the effect of a bill of lading exemption is to enable the carrier to avoid proof that it has exercised due diligence to make its vessel seaworthy, the obligation of exercising such diligence is certainly lessened and weakened, if not wholly avoided.

Second, the opinion of the Circuit Court of Appeals states that the trial Court found that no element of unseaworthiness contributed to the damage and that the facts clearly establish the delay due to strikes as the cause of damage (R. 487). We assume the Court regarded proof of such facts as essential to respondent's defense. Respondent also considered such finding essential, for it proposed such finding to the trial Court over petitioners' objection that there was no evidence on the subject in the record (R. 407-408). If such finding was essential, then the rule of proof, for which petitioners contend, must be conceded.

The flaw in the above statement of the Circuit Court of Appeals is that there is no evidence in the record that the vessel was in any respect seaworthy (R. 486). There is likewise no evidence that any unseaworthiness which may have existed did not cause the damage. The finding that the damage was not due to unseaworthiness is, therefore, simply an assumption predicated on the theory that

the carrier did not have to prove that its vessel was seaworthy. In other words, the opinion does not distinguish the rule of proof, it denies the rule. On the same state of proof, this Court stated in *Martin v. The Southwark*, supra, pages 12-13:

> "It is urged that the findings in both the District Court and the Circuit Court of Appeals, that the loss did not arise from want of proper refrigerating apparatus, but was due to a break-down in the machinery after the voyage was begun, are findings of fact in the courts below which should be held conclusive here. There are observations in the opinions of the learned judges consistent with the view that it was found that the loss was due to a breakdown in the machinery after the voyage had begun, and ordinarily such findings as to matters of fact are followed in this Court; *but the case below was tried on a theory which ignored the initial duty of the carrier to use diligence to provide a seaworthy vessel, properly equipped for the purpose intended. The bill of lading was treated as a special contract, throwing upon the shipper, if he would recover, the burden of establishing negligence upon the part of the carrier*" (Our emphasis).

In the *Southwark* case, supra, there was *some* proof of due diligence to make the vessel seaworthy, but in the present case, there is *no* such proof at all.

The Circuit Court of Appeals states that unseaworthiness alone displaces the contract of affreightment only in so far as damage is caused by the unseaworthiness (R. 487). But petitioners do not contend that respondent would be deprived of a proper bill of lading exemption

if its vessel were unseaworthy in a respect which did not cause the damage. Petitioners do contend that respondent must show that its vessel was in all respects seaworthy or that any existing unseaworthiness did not cause the damage. *The Court cannot, in the abence of proof, assume that unseaworthiness did not cause the loss.* The delay here may, so far as the record shows, have been due to unseaworthiness as well as to a strike.

The burden of proof is on the carrier. In *Philippine Sugar Agency v. Kokusai Kisen,* 106 Fed. (2d) 32, 36 (2 C.C.A.) Judge L. Hand said:

> "The burden of proof was on the ship to bring the sweat damage within the exception; if she undertook to show, as she did, that it was the weather which prevented her from ventilating the cargo, *obviously that presupposed proper equipment*" (Our emphasis).

The Circuit Court of Appeals states that when the carrier proved that the loss arose from an excepted cause, it discharged the burden resting immediately upon it, citing *The Malcolm Baxter, Jr.,* 277 U.S. 323, 72 L. Ed. 901, and *U. S. v. Los Angeles Soap Co.,* 83 Fed. (2d) 875 (9 C.C.A.). Neither of these cases discusses *what proof* is necessary to rely on a bill of lading exception. Both cases necessarily support the rule for which petitioners here contend. In *The Malcolm Baxter, Jr.,* supra, this Court did not allow the carrier to rely on any bill of lading exception *until* the vessel was shown to be seaworthy and it stated, page 333: "For the delay caused by the embargo *alone* petitioners may not recover * * *". The vessel there was liable for delay while she was unsea-

worthy, although the ship could not have sailed because of an excepted peril, even if she had been seaworthy. In *U. S. v. Los Angeles Soap Co.*, supra, the carrier assumed and pleaded the burden of proving that the vessel was in all respects seaworthy. The Court found upon affirmative proof that the vessel was seaworthy at the beginning of the voyage, page 879.

4. The Effect of the Decision of the Circuit Court of Appeals.

The decision of the Circuit Court of Appeals applies in every case brought in the Ninth Circuit where a cargo owner seeks recovery for damage to cargo and the carrier relies on exceptions in its bill of lading, subject to the Harter Act, to exempt itself from liability. The decision applies, therefore, to the usual cargo damage action, a great many of which are and will always be pending before Courts of Admiralty.

The need for uniformity of decision in admiralty causes, particularly when governed by a Federal statute, is obvious. The effect of the decision of the Circuit Court of Appeals has, however, even a more harmful effect than to disturb uniformity of decision.

The bill of lading of a common carrier by water contains an exception against almost every conceivable cause of damage. The shipper has no freedom of choice as to the contents of a bill of lading, as this Court stated in *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 441, 32 L. Ed. 788, 792. For example, the present carrier's bill of lading contains exceptions against damage due to "water" and "steam" (R. 22). If the carrier can escape liability merely by proving that the

damage is due to water or steam, without having to prove that its vessel was seaworthy or that unseaworthiness did not contribute to damage from such causes, the cargo owner will rarely be able to recover even though in fact it was unseaworthiness of the vessel or negligence which permitted the water or steam to reach the cargo. The cargo owner ordinarily cannot prove either the condition of the vessel or how the damage occurred. The carrier not only does know these facts (or should know them) but he has warranted that he will exercise due diligence to make his vessel in all respects seaworthy.

In *Schnell v. The Vallescura,* 293 U.S. 296, 304, 79 L. Ed. 373, 377, this Court said:

> "The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain, or explaining, bring within the exceptional case in which he is relieved from liability."

In *The Medea,* 179 Fed. 781, 786 (9 C.C.A.) the Court said:

> "The reason why the burden of proof is placed upon the carrier is that he or his servants know, or at least ought to know, the circumstances connected with the loss or damage to the cargo, while the owner of the lost or damaged goods has no such knowledge, and if he were required to furnish such proof it would operate as a denial of justice."

There is no hardship in requiring the carrier to prove that it has exercised due diligence to make its vessel seaworthy, or that its failure did not contribute to the damage. The carrier has agreed and the law requires it to exercise such diligence. But the rule requiring such proof does rightfully curb the carrier's opportunity of escaping liability for damage due to its fault.

POINT B.

THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT A COMMON CARRIER MAY, WITHOUT PROOF OF DUE DILIGENCE TO MAKE ITS VESSEL IN ALL RESPECTS SEAWORTHY, RELY UPON AN UNCONDITIONAL EXCEPTION IN ITS BILL OF LADING TO EXEMPT ITSELF FROM LIABILITY FOR A CAUSE OF DAMAGE TO CARGO FOR WHICH EXEMPTION IS GRANTED UNDER THE THIRD SECTION OF THE HARTER ACT ONLY UPON THE EXPRESS CONDITION THAT SUCH DILIGENCE BE EXERCISED, IS IN CONFLICT WITH A DECISION OF THIS COURT.

The third section of the Harter Act (printed in appendix) provides that a carrier shall not be liable for certain specified causes of damage to cargo, provided it shall have exercised due diligence to make its vessel in all respects seaworthy. This Court has considered the effect of Section 3 in a number of decisions.

This Court has determined that a carrier cannot exempt itself from liability for a cause of damage specified in Section 3 unless it shall have proved affirmatively, as a condition precedent, that due diligence has been exercised to make the carrier's vessel in all respects seaworthy.

The Wildcroft, 201 U.S. 378, 388, 50 L. Ed. 794, 797.

This Court has also held that a carrier who has failed to exercise due diligence to make his vessel in *all* respects seaworthy, cannot exempt itself from liability for a cause of damage specified in Section 3 even though there be no causal relation between the lack of due diligence and the damage.

> *May v. Hamburg-American Line,* 290 U.S. 333, 350, 78 L. Ed. 348, 356.

In the case at bar one of the causes of damage relied upon by respondent is the "inherent vice or nature of the goods" (R. 483). One of the causes of damage specified in the third section of the Harter Act is "inherent defect, quality or vice of the thing carried". Respondent can, therefore, by virtue of the above decisions of this Court be exempt from liability for such cause of damage only upon affirmative proof that due diligence had been exercised to make its vessel in all respects seaworthy. Such proof was admittedly not made (R. 486).

Respondent pleaded in its answer, paragraph VI (R. 25):

> "The damage to libelant's goods of which libelant complains in its libel was entirely caused by natural decay and decomposition, resulting from the inherent nature of the goods and the fact that they were on board the vessel from October 26, 1936 to December, 1936, and to February 5, 1937."

The parties also stipulated that "The delay in voyage of said vessel and detention of said cargo for the period of time involved was the sole cause of such decay resulting from the inherent nature of the cargo" (R. 67).

Respondent cannot, therefore, escape liability by claiming that it relies on its unconditional bill of lading ex-

ception against damage due to "inherent vice or nature of the goods" and ignore the condition of such exemption granted by the third section of the Harter Act.

In *Martin v. The Southwark,* 191 U.S. 1, 48 L. Ed. 65, a cargo of fresh meat deteriorated due to its inherent nature when the refrigerating machinery ceased to operate. The carrier said it relied only on its bill of lading exceptions, but this Court held (page 8):

> "Before the passage of the act, the initial obligation could be limited in certain particulars by special contract not involving negligence of the owner. Since the passage of the act, *as to cases coming within its terms,* before the owner can have the benefit of the relief provided by Sec. 3, he must have exercised due diligence to provide a seaworthy vessel, capable of performing her intended voyage."
>
> • • • • • • •

(Page 13):

> "The bill of lading was treated as a special contract, throwing upon the shipper, if he would recover, the burden of establishing negligence upon the part of the carrier. As we have before stated, the right of the carrier to be exonerated *in the respects named in the Harter Act* depends upon the exercise of due diligence upon his part in discharging the primary duty of providing a seaworthy vessel" (Our emphasis).

A carrier cannot, therefore, be permitted to nullify the Harter Act by relying on a bill of lading exception granting the benefit, but not assuming the burden provided for in the Act.

POINT C.

THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT A VESSEL WHICH IS NAVIGATED WITHOUT HER FULL CREW, CONTRARY TO A STATUTE OF THE UNITED STATES, IS NOT UNSEAWORTHY, AND THAT THE CARRIER IS NOT LIABLE FOR DAMAGE TO CARGO ALTHOUGH IT FAILED TO PROVE THAT SUCH STATUTORY VIOLATION COULD NOT HAVE CONTRIBUTED TO THE DAMAGE, IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL.

The Circuit Court of Appeals holds that the MAUI was not unseaworthy when respondent navigated her from her dock to an anchorage in San Francisco Bay, although during such navigation she did not have on board a substantial part of her required crew (R. 488).

Revised Statutes, Section 4463, as amended by Act of May 11, 1918, Chapter 72, section 1, 40 Stat. 548, 46 U.S. Code, section 222 provides:

> "No vessel of the United States subject to the provisions of this chapter or chapters 14 or 15 or to the inspection laws of the United States shall be navigated unless she shall have in her service and on board such complement of licensed officers and crew including certificated lifeboat men, separately stated, as may in the judgment of the local inspectors who inspect the vessel be necessary for her safe navigation. The local inspectors shall make in the certificate of inspection of the vessel an entry of such complement of officers and crew including certificated lifeboat men, separately stated, which may be changed from time to time by indorsement on such certificate by local inspectors by reason of change of conditions or employment. Such entry or indorsement shall be subject to a right of appeal, under regulations to be made by the Secretary of Commerce, to the supervis-

ing inspector and from him to the Supervising Inspector General, who shall have the power to revise, set aside, or affirm the said determination of the local inspectors.

If any such vessel is deprived of the services of any number of the crew including certificated lifeboat men, separately stated, without the consent, fault, or collusion of the master, owner, or any person interested in the vessel, the vessel may proceed on her voyage if, in the judgment of the master, she is sufficiently manned for such voyage: PROVIDED, That the master shall ship, if obtainable, a number equal to the number of those whose services he has been deprived of by desertion or casualty, who must be of the same grade or of a higher rating with those whose places they fill. If the master shall fail to explain in writing the cause of such deficiency in the crew including certificated lifeboat men, separately stated, to the local inspectors within twelve hours of the time of the arrival of the vessel at her destination, he shall be liable to a penalty of $50. If the vessel shall not be manned as provided in this section, the owner shall be liable to a penalty of $100, or in case of an insufficient number of licensed officers to a penalty of $500."

The MAUI was admittedly short twelve members of her deck crew for some time prior to and when she cast off her lines on order of respondent's operating manager (R. 212, 253, 361, 365). Twenty-one members of the engine-room crew also left the ship after her lines were cast off (R. 225, 243, 343). The vessel's required crew consisted of 53 men (R. 212).

The master did not testify that in his judgment the vessel was sufficiently manned. He made it quite clear

that he considered the vessel to be inadequately manned (R. 245, 246, 248, 255, 276). Respondent's efforts to secure crew replacements were made, as stated in the opinion, *after* the MAUI had been navigated from her dock to anchorage (R. 485).

A vessel navigated without the required crew in violation of the above statute is unseaworthy.

The Denali, 105 Fed. (2d) 413, 420, on rehearing 112 Fed. (2d) 952, 954 (9 C.C.A.);

The New York Marine No. 10, 109 Fed. (2d) 564, 566 (2 C.C.A.);

U. S. v. The Science, 27 Fed. Cas. No. 16,239 (W.D., Pa.);

Smith v. Northwestern Fire & Marine Ins. Co., 1928 A.M.C. 174, 179, 159 N.E. 87, 90, 246 N.Y. 349, 356.

In the case last cited, the late Mr. Justice Cardozo, then a member of the New York Court of Appeals, said:

> "We think the vessel sailed in an unseaworthy condition. She was without the complement of crew required by the statute. Such a vessel 'shall not be navigated unless she shall have in her service and on board such complement of officers and crew as may in the judgment of the local inspectors who inspect the vessel be necessary for her safe navigation,' R.S. 4463. The argument is made that less than the complement called for by the certificate of the inspectors sufficed for safe navigation while the vessel was still within the waters of the harbor. The judgment of a jury is thus to supplant the judgment of the public officers who have been charged with the duty of inquiry and decision."

Since the MAUI was navigated in violation of a statute, the burden rested on respondent to prove not merely that the navigation of the vessel in violation of the statute did not, but that it *could not* have contributed to the damage.

Richelieu & Ontario Nav. Co. v. Boston Marine Ins. Co., 136 U.S. 408, 422, 34 L. Ed. 398, 403;

Lie v. San Francisco & Portland S. S. Co., 243 U.S. 291, 298, 61 L. Ed. 726, 733;

The Denali, 105 Fed. (2d) 413, 418 (9 C.C.A.);

The New York Marine No. 10, 109 Fed. (2d) 564, 566 (2 C.C.A.).

The Circuit Court of Appeals states in its opinion that the removal of the MAUI from her dock to the powder anchorage did not contribute to the delay of the voyage (R. 488). There is no finding that the violation of the statute did not contribute to the *damage*. There obviously can be no finding that such violation *could not* have contributed to the damage.

The Court found that the ship could not continue her voyage and could not return to her dock without a full crew (R. 485). Petitioners' cargo, therefore, remained on the ship for months at her anchorage and rotted. If the ship had remained at her dock, the cargo could have been discharged before the general maritime strike occurred. No one can now say that the vessel would not have secured a crew if she had remained at her dock. Other ships, including one operated by respondent, secured crews while at their docks (R. 355). Respondent claims that it could secure crews only through the unions. It was, therefore, not dealing with a few recalcitrant individuals who might

be coaxed out to a ship in the bay and then have to stay there. The unions naturally did not relish the idea of even polite shanghaiing.

Under the circumstances, respondent can hardly claim that its breach of the statute did not contribute to the damage. It certainly cannot now prove that such violation could not have contributed to the damage.

CONCLUSION.

Wherefore, petitioners respectfully pray that a Writ of Certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit and that the final decree of said Court be reviewed and reversed.

Dated, San Francisco, California,
October 23, 1940.

Respectfully submitted,
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(Appendix Follows.)

Appendix

HARTER ACT.

Title 46. U. S. Code, Secs. 190, 191, and 192, Act of February 13, 1893, chapter 105, sections 1, 2 and 3, 27 Stat. 445.

Section 1.

§190. Stipulations relieving from liability for negligence. It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

Section 2.

§191. Stipulations relieving from exercise of due diligence in equipping vessels. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence* properly equip,

*The word "to" should probably be inserted though it was not in the original act as published in the Statutes at Large.

man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

Section 3.

§192. Limitation of liability for errors of navigation, dangers of the sea and acts of God. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies or the inherent defect, quality or vice of the thing carried, or from insufficiency of package or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

QUOTATIONS FROM ADDITIONAL CASES REFERRED TO ON PAGE 22 OF THE FOREGOING BRIEF WHICH ARE IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE.

In *The Benjamin Noble,* 232 Fed. 382, 389 (E. D. Mich.), affirmed in 244 Fed. 95 (6 C.C.A.), the carrier relied on bill of lading exceptions against dangers of navigation, fire and collision. The Court said:

> "The claimants having shown that they made this contract directly with the owners of the vessel, to carry these rails, and that they were actually delivered in good order to the carrier, and that they received a bill of lading and receipt therefor, and then having proven that the cargo never reached its destination and was never delivered to the consignee, the claimant could then have rested its case, and the burden would have shifted to the petitioner in this case to prove the competency of its crew, the seaworthiness of its vessel, and that the loss occurred within one of the exceptions, such as perils of the sea, for which it is relieved of liability under the bill of lading and the so-called Harter Act."

In *The Kensington,* 88 Fed. 331, affirmed 94 Fed. 885, 2 C.C.A., affirmed on merits, but modified to allow recovery of actual damage instead of limited value, 183 U.S. 263, 46 L. Ed. 190, the Court said, pages 333-334:

> "One of the exemptions specified in this ticket or contract is losses 'by perils of the sea', and upon the evidence, if preliminary proof of good stowage had been given, I think a prima facie case of loss by sea perils would have been made out, which it was incumbent on the libelants to rebut by proof of negligence in the ship. The evidence leaves no doubt that the passage was one of very extraordinary severity, such as might account naturally for what happened, viz.

> the baggage getting adrift and breaking the steam pipe, even though the baggage was well stowed; but it might also have happened from poor stowage, of which some evidence was sought to be given, though I do not regard it as of much weight. There is no direct evidence of the mode of stowage, but only that the baggage was stowed by the regular stevedore of the line * * *."
>
> "To assume proper stowage upon mere inference and to throw upon a shipper or passenger the burden of proving the contrary, without any proof by the ship, seems unreasonable and inequitable, considering that proof on this subject is peculiarly within the power of the ship to produce, and comparatively easy for her, but difficult if not impossible for the passenger or the shipper. Proper stowage, moreover, is essential to seaworthiness as respects cargo or baggage; and hence this essential preliminary condition of seaworthiness should have been established by the ship by proof of proper stowage, just as in The Edwin I. Morrison, 153 U.S. 210, 14 Sup. Ct. 829, it was held necessary to be established by proof of proper inspection."

In *The Agwimoon*, 24 Fed. (2d) 864, 867 (D. C. Md.), affirmed in 31 Fed. (2d) 1006 (4 C. C. A.), the carrier relied on a bill of lading exception against leakage and the Court held:

> "It was there held that the vessel, having failed to prove use of due diligence, could not rely on an exemption clause, in view of a provision incorporating the Harter Act in the charter."
>
> "Thus, taking the charter as a whole, the proper meaning to be derived from it is that the shipowner shall be responsible for leakage, unless he has exer-

cised due diligence to make the vessel seaworthy at the inception of the voyage."

In *The Poznan,* 276 Fed. 418, 431 (S. D. N. Y.), Judge Learned Hand said, in language which speaks for itself:

> "The bill of lading contains exceptions against loss by thieves and by breakage. These exceptions are not in the words of the Harter Act, but no point is made that they are void for that reason, if construed with an implied limitation that due diligence was in fact used to stow, handle, load, and deliver. I shall therefore assume that they are valid, but such limitations are implied. The burden is on the ship to prove that the losses fall within the exceptions so construed."

In *The Cornelia,* 15 F. (2d) 245, 247 (S.D.N.Y.), the carrier relied on bill of lading exceptions against damage caused by sea water, wetting, drainage, leakage or wastage. The Court said:

> "From this absolute warranty the vessel and her owners may be relieved by special contract, provided due diligence has been exercised to make the vessel seaworthy. The Prussia, 93 F. 837, 35 C.C.A. 625. The exemptions found in the contract of carriage and in the bills of lading are sufficient for this purpose, provided due diligence has been exercisd to make the vessel seaworthy, but the claimant must sustain the burden of proving the exercise of due diligence."

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 531

JOHN DEMARTINI CO., INC. (a corporation), EDWARD L. KAHN, doing business under the name and style of Edw. L. Kahn & Co., and P. LERNER COMPANY, LTD. (a corporation),

Petitioners,

vs.

THE AMERICAN STEAMER MAUI, her engines, boilers, tackle, apparel, and furniture, and MATSON NAVIGATION COMPANY (a corporation),

Respondents.

Brief of Respondents in Opposition to Petition for Writ of Certiorari

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In the Supreme Court of the United States

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Petitioners,

vs.

THE AMERICAN STEAMER MAUI, her engines, boilers, tackle, apparel, and furniture, and MATSON NAVIGATION COMPANY (a corporation),

Respondents.

Brief of Respondents in Opposition to Petition for Writ of Certiorari

STATEMENT OF FACTS

The case presented by the petition bears but little resemblance to that argued in the Circuit Court of Appeals and still less to the case tried in the District Court.

This case was purely one of fact. On all the facts the District Court made full findings, and in all of them the Circuit Court of Appeals concurred, thus bringing the case within the "two court" rule.* Compactly stated, the facts are these:

In the late summer and early fall of 1936 collective bargaining agreements between Pacific Coast shipowners and the various maritime and longshore unions were due to expire. Prolonged negotiations for new contracts ensued for a period of over three months. The unions threatened strike and set various deadlines which were postponed from time to time as negotiations continued. Meanwhile, numerous "quickie" strikes and work stoppages occurred, affecting this or that ship in unpredictable fashion. Finally, the date of October 28, 1936, was set as the strike deadline by the unions (R. 483, 484, 439, 134-153).

All this was of wide public notoriety and well known to petitioners (R. 484, 439, 141, 159, 160, 163-172). In this known state of affairs the steamship "Maui" was scheduled to sail from San Francisco to Hawaii, originally on October 28th, but to get to sea, if possible, ahead of the proposed strike, if one should come, the schedule was moved forward to October 27th. This fact was also known to the petitioners (R. 83-86, 105-106, 121-123).

Possessing all this knowledge before acting, the petitioners committed their goods to the "Maui" on October 26 and 27 under bills of lading expressly exempting the carrier from liability for losses arising from detention, strikes, stoppages or shortage or restraint of labor, and

*Cf. *The Iroquois*, 194 U. S. 235, 247.

labor troubles, whether of carrier's employees or of others, partial or general (R. 436-439, 483).

At the time of loading petitioners' goods, the vessel had a full crew (R. 484, 432). Before the voyage could commence, it was necessary for the ship to load a cargo of explosives, and for this purpose it was necessary to make a port movement to the explosives anchorage in San Francisco Bay, a few hundred yards from the dock (R. 430, 482). Shortly before the vessel cast off lines to go to the explosives anchorage on October 27, the unlicensed deck crew of twelve men quit the ship (R. 432, 484). The vessel still had a full crew of licensed officers, a full engine crew and a full steward's department. To enable the ship to carry out the port movement from dock to explosives anchorage, the work of the unlicensed deck crew was performed by such of the licensed officers as were not on watch (thus performing duties beyond those of their offices) and by three extra relief officers from shore (R. 258, 344). Since the unlicensed crew must by law be divided into three watches of equal size, only one of which would be on duty at any time, the work of the unlicensed deck department was actually being performed by as many men as would in any event have been used.

After the lines were cast off, when the ship was already underway and after the tide had caught it, the unlicensed engine crew unexpectedly deserted the ship and swarmed ashore. This, too, was a "quickie" strike. It was then too late to stop the vessel. All that could be done was to permit it to go to anchorage in the bay (R. 433, 484, 245). This was done. The petition fails to note that the loss of the engine crew occurred after it was too

late to stop the vessel. The next day the steward's department quit the ship. Meanwhile, longshoremen hurled threats at the officers if they persisted in doing sailors' work.

By virtue of the "quickie" strikes the vessel lay anchored in the bay. Because of lack of a crew, it was physically impossible to return to the dock (R. 433, 485).

At midnight, October 29, 1936, a general coastwide maritime strike of all labor broke out and lasted until February 5, 1937 (R. 433, 434, 484).

As a consequence of the "quickie" strikes and labor stoppages of October 27 to 29 and the general strike of October 29 to February 5, the vessel could do naught but lie at anchor in the bay; the petitioners' perishables rotted away before the vessel could return to the dock on February 5.

Petitioners comment (petition, p. 4) that the Circuit Court of Appeals by referring to the general strike as the background of the litigation apparently believed that strike conditions lessen a carrier's legal obligation. This suggestion of the petitioners is utterly false and is an unjustified attempt to inject into this simple case of negligence or no negligence supposedly exciting complications.

No such significance can be attached to the decision of the court below. The strike clause was relied on merely to relieve the carrier from what might otherwise be an insurer's liability. It was recognized that if the carrier were negligent in the premises and if negligence proximately caused the loss, it would be liable. The question in the case was therefore merely whether there was any such negligence (R. 487).

Both the District Court and the Circuit Court of Appeals found the following to be the facts, among others:

The voyage never commenced (R. 430, 488).

The respondent not only was not negligent in any respect, but in fact exercised the greatest care, diligence, prudence and wisdom in the circumstances (R. 431, 432, 433, 434, 435, 440, 444, 445, 485, 488).

The loss was entirely due to deterioration resulting from delay; the respondent exercised all care to preserve the cargo on board during the delay; and the *sole* cause of the delay was the strikes and the labor troubles, a cause exempt by the bills of lading (R. 432, 434, 435, 440, 487).

The respondent exercised the highest degree of care and diligence to obtain and maintain a crew, to carry out the contracts of affreightment, and to avoid the consequences of the strikes and labor stoppages (R. 435, 485).

It was impossible to bring the vessel back to the dock; and had it been possible, it would not have been the diligent or reasonable thing to do, it being reasonably anticipated that a crew would be completed and the ship set on its voyage (R. 444, 445, 485, 486).

Permitting the vessel to start to the explosives loading anchorage without its usual number of unlicensed deck crew was not negligent, but, on the contrary, was an act of care and prudence, reasonably adapted and in fact called for by experience of the industry, and justifiably expected, to facilitate completion of the crew and to enable the vessel to start its voyage (R. 444, 485). The universal experience of the whole industry, of the respondent company and of this ship itself demonstrated that as long as shipside was at

> the dock, the crew could never be completed because of steady leaking away, whereas by removing a vessel a short distance from the dock it could soon obtain its full complement and sail (R. 153, 154, 216, 332, 333).*

The loss thus having occurred by reason of causes from liability for which carrier was exempt by the contract of affreightment (R. 440, 487), and the evidence having demonstrated that the carrier was guilty of no negligence, petitioners have tirelessly sought some theory upon which to hold the carrier liable without fault on its part. Many theories were advanced by them in the several courts below, and the petitioners now proffer three of the many (petition, pp. 6 and 7).

But petitioners' first point was not raised in any form until after the trial of the case, and it was not raised in its present form until the case reached the Circuit Court of Appeals. Petitioners' second point was not raised until they filed their Reply Brief in the latter court, and their third point was not raised until they filed in the Circuit Court of Appeals a petition for rehearing.

We now take up each of the three contentions in turn.

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*Petitioners refer invidiously to the practice as a form of "shanghaiing". No "shanghaiing" is involved. There is no element of duress, coercion, force or involuntary detention. The practice merely took account of practical psychology.

DISCUSSION

I. REPLY TO PETITIONERS' POINT A

Summary

Respondent did not lose the protection of the contract exemption by not offering proof on the matter of general seaworthiness of the vessel.

Discussion

When a shipper proves that his goods are damaged, the carrier, if he bases a defense on the contract of affreightment (bill of lading), must establish that the cause of the loss falls within a bill of lading exception. This done, the shipper may still recover if he can prove that the carrier was guilty of negligence proximately causing the loss.

In the instant case, the respondent established, as both the District Court and the Circuit Court of Appeals found, that the loss was due *solely* to the delay which was *solely* caused by the strikes and labor troubles, a cause excepted by the bill of lading. There was no other cause.

As the Circuit Court of Appeals said:

> "The facts clearly establish as the cause of the damage the delay in shipment. And the delay, in turn, was shown to have been the consequence of an excepted cause, not involving negligence on the part of the shipowner." (R. 487)

The evidence did not merely show (as the petition, p. 15, puts it) that the loss was "apparently" due to an excepted cause; it *demonstrated* beyond chance of quibble that the loss was due to an excepted cause. The respondent then did not rest, as it might have done, on the rule that it was the shipper's burden to prove negligence; the

respondent itself affirmatively established, to the satisfaction of both courts below, that there was no negligence. Questions of burden of proof do not therefore arise.

Now, petitioners urge that to avail itself of bill of lading provisions the carrier must go further and affirmatively prove seaworthiness of the ship in every respect. They do not claim that there was any item of unseaworthiness causally related to the loss, nor do they suggest any particular kind of seaworthiness toward which the carrier should have directed proof. They mean that the carrier was bound to prove that it was free from negligence with respect to matters having no causal relation to the damage; that there is an artificial rule requiring the carrier in every suit for cargo damage to offer proof that every nut, screw, rope and plank from the highest mast to the keel was seaworthy.

Common sense and the established law are clearly otherwise, and are this: Where the carrier's defense is based on an exception in the bill of lading, unseaworthiness is absolutely immaterial, unless the proximate cause of the damage is proved to be some specific element of unseaworthiness; in the latter event it becomes material to inquire into the question whether there was due diligence to make seaworthy. *The Malcolm Baxter, Jr.*, 277 U. S. 323, 72 L. Ed. 901, definitively settled the law:

> "Unseaworthiness alone or deviation caused by it displaces the contract of affreightment only in so far as damage is caused by the unseaworthiness."

As stated in an elementary work, 58 *Corpus Juris*, 416:

> "Unseaworthiness of the ship does not preclude exemption from liability for damages resulting from

> a cause wholly distinct from unseaworthiness and excepted by the parties, and it has been held that seaworthiness is not a condition precedent to the operation of the contractual limitations of liability."

No decision can be found supporting petitioners' contention. The petition (p. 16) erroneously states that the Circuit Court of Appeals "concedes that its ruling creates a conflict with other decisions". On the contrary, what the court below said was that it did not agree that the cases cited by the petitioners established the rule for which they contend.

Petitioners' argument is a confusion of unlike things, seeking to project the rules concerning a defense under Section 3 of the *Harter Act* (46 *U. S. Code,* Sec. 192) into the field of bill of lading (contractual) defenses.

Generally speaking, a ship may by contract excuse itself from liability for anything except negligence. But in addition to contractual exemptions, it has certain immunities under statute. Section 3 of the *Harter Act* (46 *U. S. Code,* Sec. 192) exempts the shipowner from certain kinds of negligence of his employees provided he has exercised due diligence to make the ship seaworthy before it commenced the voyage. Where the shipowner seeks *statutory* exoneration as from negligence for which otherwise he would be liable, he must comply with the conditions precedent prescribed by the statute, and since the statute prescribes that he must have exercised due diligence to make the ship seaworthy, he must prove that fact. The reason is purely statutory, as shown by *The Wildcroft,* 201 U. S. 378, 50 L. Ed. 794, and *The Isis: May v. Hamburg-American Line,* 290 U. S. 333, 78 L. Ed. 348.

The necessity of proving seaworthiness or due diligence to make seaworthy exists only when the statute is invoked. But where the shipowner is not seeking statutory exemption and the cause of the loss is not unseaworthiness, inquiry into seaworthiness need not be made.

Here respondent did not invoke the *Harter Act* for immunity, nor did it raise any defense to exempt it from negligence but relied on the contract to exonerate it from an insurer's liability for damage not resulting from negligence.

In the *Horaisan Maru: Yokohama, etc., Bank v. Mitsui & Co., Ltd.*, 73 Fed. (2d) 526, 527, 1935 A. M. C. 96 (C.C.A. 2), the court said (per Learned Hand, J.):

> "* * * she [the ship] need not rely upon Section 3 of the Harter Act (46 U. S. C. A., Sec. 192), and would be liable only in case she was unseaworthy in some way which caused the loss". (p. 527)

Petitioners' chief reliance is *Martin v. The Southwark*, 191 U. S. 1, 48 L. Ed. 65. That case does not support the contention. There a cargo of meat rotted, and the cause was conceded and proved to be unseaworthiness, i.e., failure of the refrigeration apparatus during the voyage. This Court held that the carrier could not claim exemption under Section 3 of the *Harter Act* because it did not comply with the requirements of Section 3 that it prove due diligence to make the ship seaworthy. The carrier then argued that it relied on a contract clause. The contract clause in question is quoted in 191 U. S. at page 2 and provides that the "goods shipped hereunder are absolutely at the risk of the owner in every respect, and that

the carrier is responsible for no loss, delay or damage thereto, however arising". This clause was held absolutely void, because it sought to relieve the ship from liability for damage to refrigerated cargo arising from any and all causes including the ship's own negligence, and because under Section 2 of the *Harter Act* a bill of lading clause is void which seeks to relieve the carrier from its own negligence. To escape liability it was necessary to fall back on Section 3 of the *Harter Act,* the statutory exemption. This the carrier could not do because it had not complied with the condition precedent prescribed by the section (see discussion, 191 U. S. pp. 16-17). In the present case respondent does not invoke Section 3, and the contract does not violate Section 2.

As stated in *The Willdomino,* 300 Fed. 5, 10 (C. C. A. 3) (affirmed 272 U. S. 718), the principles which *The Southwark* is recognized as holding are that under the *second* section of the *Harter Act*

> "liability for loss to cargo caused by unseaworthiness arising from lack of diligence on the part of the owner cannot be contracted away."

and that

> "The burden is on the shipowner setting up exemption from liability under the *third* section of the act to prove that he exercised due diligence to make the vessel in all respects seaworthy * * *."

The petition cites a number of other cases. Some are instances of defenses under Section 3 of the *Harter Act.* Most of the cases cited are still less in point. They are cases where a specific element of unseaworthiness was

proved and established as having directly caused the damage, and the failure to exercise due diligence to provide a seaworthy ship in the respects involved was an act of negligence directly causing the damage. Some of these cases, where a specific element of unseaworthiness was proved to be the proximate cause of the damage, allude to or turn on the matter of burden of proof of due diligence (or lack of due diligence) to make the ship seaworthy in the exact premise. But this question of burden of proof does not arise in the present case, because the facts were fully proved by respondent and affirmatively established, as both courts below found, that the cause was something other than negligence. (Cf. *Horaisan Maru: Yokohama etc. Bank v. Mitsui & Co. Ltd.*, 1935 A. M. C. 96, 73 Fed. (2d) 526 (C. C. A. 2d).)

In an appendix hereto we briefly digest a number of the other cases cited by petitioner showing that they are not in point.

The rule that the statutory immunities of Section 3 of the *Harter Act* cannot be invoked unless the carrier establishes seaworthiness in all respects though causally unrelated to the loss, while accepted as a necessary deduction from the language of Section 3, was generally thought to be unfortunate. Cf. *Robinson (Hornbook) on Admiralty*, Sec. 71, pp. 510-512. Subsequently the *Harter Act* was for the most part replaced by the *Carriage of Goods by Sea Act of 1936* (46 *U. S. Code*, Sec. 1300 et seq.) in accord with the Hague Rules. It is significant that the latter act wholly abandons the rule to which we have just referred (46 *U. S. Code*, Sec. 1304, subd. 1; *Robinson on Admiralty*, pp. 512-513).

It would indeed be anomalous that a disappearing and disapproved condition on statutory immunity should now for the first time be extended to contractual exemptions.

Petitioners, in the several stages of presenting their contention, have gradually modified it so that it now appears to assume this form: That in order to rely on the contract a carrier must prove seaworthiness in all respects, and, if it cannot, it must prove that the existing elements of unseaworthiness did not cause the loss. So stated, the contention has no support even in analogy to cases arising under Section 3 of the *Harter Act*. The reason advanced for the suggested rule is that it cannot be determined that unseaworthiness did not cause the loss unless the carrier proves that there was no unseaworthiness or shows in what respects, if any, the vessel was unseaworthy.

But when the carrier proves a clear cause as here, i.e., the labor disturbances, logic does not require it to negative the existence of a host of other things which a fertile imagination might conjure. The strike and labor disturbances here were proved and found to be the sole cause of the damage. The issue here was not seaworthiness but cause of the loss, and the ordinary standard of proof prevails, i.e., evidence sufficient to satisfy the reasonable mind is enough. The evidence here was not merely sufficient—it was devastatingly complete. An argument similar to that of petitioners was rejected by the Exchequer Court of Canada in the *John A. McDougald*, 1939 A. M. C. 541 at 551.

Moreover, the ship was in fact proved seaworthy. The record is repetitious that the ship was ready to sail and

would have sailed had the crew not left it (e.g., R. 151, Resp. Ex. M; R. 222, Resp. Ex. S; R. 219, Resp. Ex. R). There is nothing in the record to raise even a doubt on the subject. Respondent's witnesses were not even cross-examined for the purpose of finding doubts. To suggest now that the "Maui" was not proved seaworthy, even were proof of seaworthiness necessary, is sophistry.

The petition (at pp. 22-24) seeks to find a reason for the rule which petitioners advance. They say that there is an implied warranty of seaworthiness which by contract may be reduced to the exercise of due diligence, but that under Section 2 of the *Harter Act* the duty to exercise due diligence to make the ship seaworthy cannot be avoided. We quite agree, but negligence not related causally to a loss is immaterial (*The Malcolm Baxter,* supra), and the duty of care is not avoided by not inquiring into irrelevancies. Petitioners say that the carrier knows the facts connected with the loss and ought to explain them. That is exactly what the carrier here did. The respondent established beyond quibble the cause of the loss. It did not rest with showing that the damage was caused by decay or with showing that the decay was due to delay, but it showed the cause of the delay. It proved not only the immediate cause of the loss, but also the proximate cause.

The bill of lading clauses invoked in this case do not violate Sections 1 or 2 of the *Harter Act,* for they leave the carrier liable for losses due to acts of negligence or failure to exercise due diligence.

If the "reasons" suggested by petitioners had merit, it would be strange that they were ignored in the adoption

of the Hague Rules and the *Carriage of Goods by Sea Act*. Yet under that Act the carrier not only need not prove seaworthiness in respects not causally related to the loss, but he need not prove due diligence to make the ship seaworthy unless he claims statutory immunity from loss due to unseaworthiness. His statutory immunity from other causes of damage is not even conditioned on diligence to make the ship seaworthy (*Robinson on Admiralty*, p. 513; *Carriage of Goods by Sea Act*, 46 *U. S. Code*, Sec. 1304(2)). Among these other exempted causes of damage are strikes and labor troubles (46 *U. S. Code*, Sec. 1304(2) (j)). Certainly a contractual exemption against loss caused by strikes gives no less protection than the *Carriage of Goods by Sea Act*.

II. REPLY TO PETITIONERS' POINT B

Summary

Where a contractual exemption does not violate Sections 1 and 2 of the Harter Act, i. e., does not seek to excuse the carrier from negligence, it is valid. The carrier is entitled to the protection of such contract without establishing the conditions whereunder it would be entitled to the statutory immunities of Section 3 of the Harter Act from a similar loss.

Discussion

Petitioners argue that when Section 3 of the *Harter Act* extends statutory immunities to a carrier under given conditions, the carrier is not entitled to contractual exemption from liability for the same type of loss except under the conditions under which the statutory immunity is conferred. By this argument petitioners revert to the

more extreme form of the contention made by them under their Point A, namely, that a carrier cannot have the protection of the contract unless he first establishes that the ship was seaworthy in all respects, including such as have no causal relation to the loss.

This contention is supported by neither reason nor authority. It was not raised by the petitioners in any one of their 45 assignments of error from the District Court to the Circuit Court of Appeals (R. 450-461), and was first made in a cursory manner (½ page) in their reply brief before the latter Court.

Petitioners cite three cases: *The Wildcroft,* 201 U. S. 378; *May v. Hamburg-American Line,* 290 U. S. 333, and *Martin v. The Southwark,* 191 U. S. 1.

Neither *The Wildcroft* nor *May v. Hamburg-American Line* involved a contractual exemption; each was solely a case where immunity was sought under Section 3 of the *Harter Act.* They did not hold (as petitioners state) that a carrier cannot exempt itself from liability for a cause of damage such as is specified in Section 3 unless it proves the existence of the conditions under which Section 3 would itself grant immunity. They merely held that a carrier cannot have the statutory exemption of Section 3 without complying with the conditions of Section 3. We have already noted that *Martin v. The Southwark* merely held that before obtaining the protection of Section 3, the carrier must comply with the conditions of Section 3, and that before obtaining the protection of a contractual clause, the clause must comply with Section 2.

The *Harter Act* is read in the light of its purpose, and it had a twofold purpose: (1) to grant immunities from

certain risks in the absence of and without necessity of contract; and (2) to confine the extent to which liability might be limited by contract (*The Willdomino*, 300 Fed. 5, 9, 10 (C. C. A. 3), aff'd. 272 U. S. 718; *The Germanic*, 124 Fed. 113 (C. C. A. 2), aff'd. 196 U. S. 589; *Koppers Connecticut Coke Co. v. James McWilliams Blue Line, Inc.*, 89 Fed. (2d) 865, 866 (C. C. A. 2), cert. den., 302 U. S. 706).

The first purpose was accomplished by Section 3; the second by Sections 1 and 2. The limitations placed on contractual exemptions by Sections 1 and 2 are, briefly, that the carrier may not contract against liability for its own negligence. If a contractual clause does not violate Sections 1 or 2, it is valid and effective. By Section 3 statutory immunity was granted even in case of certain types of negligence. Section 3 does not confine contractual clauses at all. It is a grant of immunity, not a prohibition; the grant is conditional, but the conditions of Section 3 are a limitation of the statutory grant of immunity of that section, not a prohibition of contractual exemptions.

The baselessness of petitioners' contention is even more apparent when reduced from the general to the specific. The petitioners say that the loss here was due to the inherent nature of the goods; and that because Section 3 of the *Harter Act* grants immunity, *inter alia*, from damage "due to inherent defect, quality or vice of the things carried", a contractual exemption from liability for loss due to inherent nature of goods is inoperative, even though carrier was guilty of no negligence, unless the carrier prove that the ship was seaworthy in all respects, however unrelated to the damage. The contention means, simply, that a bill of lading clause relative to inherent

nature of goods is not necessary because it can do no more than the statute would do in its absence.

We have noted that the *Harter Act* was enacted not for the purpose of increasing the carrier's common law liability, but to limit common law liability and to define the extent to which it could be limited by contract. At common law, in the absence of contract, the carrier was an insurer with respect to goods, but to this rule there were certain exceptions. One of the exceptions was that the carrier was not liable for loss due to inherent nature, vice or condition of the goods carried (*Clark, et al. v. Barnwell, et al.*, 12 How. (53 U. S.) 272 at 282; *The Willdomino*, 300 Fed. 5, 9 (C. C. A. 3d)). If petitioners' contention were correct, the effect of the *Harter Act* would be to create and increase liability over the common law basis. The contention is patently absurd.

As a matter of fact, the nature of the goods was not the cause of the loss but a condition or quality upon which the proximate cause—the delay caused by the strikes—operated. (Cf. *Schnell v. The Vallescura*, 293 U. S. 296, 305; 79 L. Ed. 373). For this reason respondent defended upon the contract.

III. REPLY TO PETITIONERS' POINT C

Summary

No question of navigating a vessel without a full crew, contrary to the provisions of any statute, arises in this case.

Discussion

Petitioners contend that the "Maui", in going the few hundred yards from the dock to explosives loading anchorage, navigated in violation of a statute (46 *U. S. Code*, Sec. 222). This is a false issue. The statute was first cited and the contention first advanced by the petitioners in a petition for rehearing filed with the Circuit Court of Appeals after that court had rendered its decision. It does not appear in any of petitioners' 45 assignments of error from the District Court to the Circuit Court of Appeals (R. 450-461).

No such question exists in the case. No such question is discussed in the opinion of the Circuit Court of Appeals, and the existence of such a question is not even adumbrated by the facts stated in that opinion.

The statute has no application to this case for several reasons. It pertains to navigation of a vessel with a lesser complement of men than *required* by the local federal inspectors. But there is no evidence whatever that the "Maui" did not have aboard as many men as *required* by the local inspectors. The evidence merely shows how many men the vessel normally carried on its transpacific voyages, but there is no evidence of the number of men *required* by the inspectors either for the transpacific voyage, or, more in point, for port movements in the port of San Francisco. Petitioners' assertion that the vessel

lacked the *required* complement is a pure assumption that the usual complement on the voyages to Hawaii was the minimum required by the inspectors. Such an assumption is without evidentiary support, contrary to the presumption of innocence of crime, and unwarranted in view of the fact that many ships ordinarily carry a greater crew than the legal minimum and that the inspectors often permit operations in safe waters with less crew than on the high seas.

Moreover, the evidence shows that when the vessel started to move the short distance from the dock to the explosives anchorage, it had on board and at the posts of duty as many men as it ever does. It had a full set of officers, a full engine crew, a full steward's department and, in addition, several relief officers from shore to do unlicensed deck work for the short movement (R. 344). Although its usual unlicensed deck personnel for transpacific voyages was 12, only four would have been used for duty in any event, since the law requires division of crew into three watches. The place of these four was in fact taken by the relief men as well as the assistance of the regular officers who were willing to do sailors' work.

The statute, moreover, presupposes a voyage, while here, as both courts below have found, the "Maui" never commenced any voyage. It was not traversing harbor waters on its way to sea, on a voyage already started, as was the situation in *Smith v. Northwestern etc. Co.*, 159 N. E. 87, cited in the petition. The movement from dock to explosives loading anchorage was merely a movement from one loading berth to another loading berth in the same harbor, not in the course of a voyage but prepara-

tory thereto. As noted in *American-West African Line v. Socony Vacuum Corporation*, 4 F. Supp. 515, 519, following *Gilchrist Transportation Company v. Boston Insurance Company*, 223 Fed. 716 (C. C. A. 6):

> "The movement of the West Kebar from one berth to another in the same harbor did not constitute the commencement of the voyage. There is a distinction between the preparation for a voyage and the management of the same after it is begun."

To suggest, as petitioners do, that a ship may not move from one loading berth to another while loading and before prepared to commence its voyage, unless it has on board its usual transoceanic complement, is baseless to the point of absurdity. No vessel could ever leave its dock or hope to get to sea, for, as long as a vessel lies at its dock and loads, the crew leaks away and cannot be held. For this reason, both courts below found that moving from dock to anchorage was an act of care and diligence reasonably and soundly designed to facilitate the completion of the crew.

If the movement of the few hundred yards from dock to explosives loading anchorage could be considered a "voyage" for the purposes of the statute, nevertheless the statute provides that if the vessel is deprived of the services of any number of the crew without its consent or fault,

> "the vessel may proceed on her voyage, if in the judgment of the master, she is sufficiently manned for such voyage."

Here the men who left the vessel did so without consent or fault of the ship. With the remaining crew it was suf-

ficiently manned for the port movement in point of actual fact as well as in the judgment of the master. The petition states (p. 35) that the master made it clear that he considered the vessel inadequately manned. This assertion is contrary to the fact. The master testified that it was entirely safe to cast off the lines to go to anchorage but that it thereafter became unsafe to try to return to the dock because conditions had radically altered in the interim. For example, the engine crew deserted when it was too late to stop the ship, and the licensed officers were threatened by longshoremen and therefore declined to do anything but the proper work of their positions. (e. g., R. 245, 248, 250, 333)

There being, then no violation of any statute, petitioners' contention deserves no further attention.

CONCLUSION

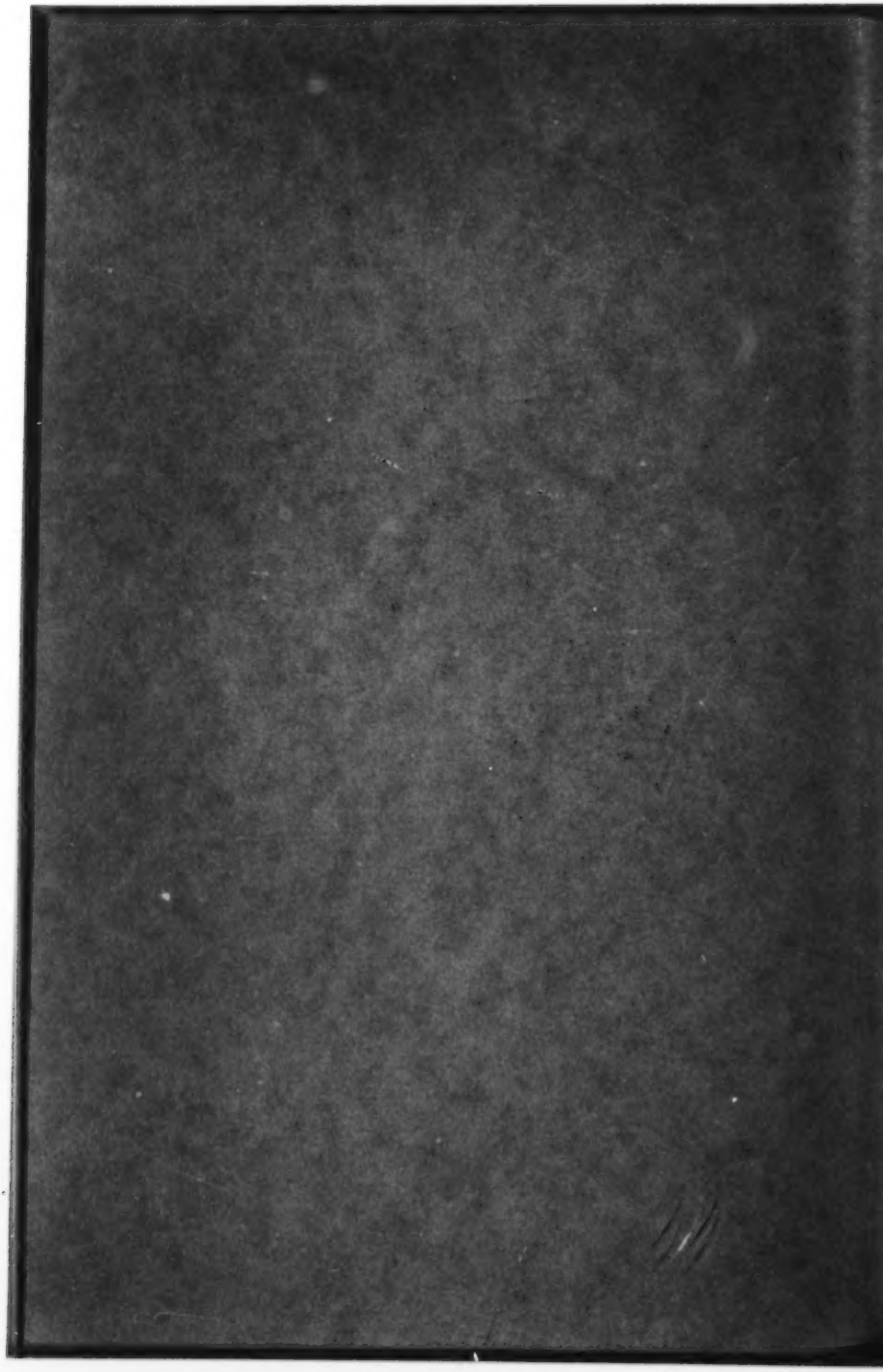
We respectfully submit that a writ of certiorari should not be granted.

DATED: San Francisco, California,
November 15, 1940.

HERMAN PHLEGER,
MAURICE E. HARRISON,
MOSES LASKY,
Proctors for Respondent.

BROBECK, PHLEGER & HARRISON,
Of Counsel.

(APPENDIX FOLLOWS)



APPENDIX

The petition cites a number of cases in alleged support of its contention that before a carrier may invoke the protection of a bill of lading clause, it must prove the seaworthiness of the vessel in all respects, even though it has proved that the loss was occasioned by an excepted cause, the cause being other than unseaworthiness, and that the carrier was guilty of no negligence causing the loss. The cited cases do not so hold. We briefly digest the cases here.

Bradley Fertilizer Co. v. The Edwin I. Morrison, 153 U. S. 199, 38 L. Ed. 688, was a suit brought under a charter party. The opinion notes that in the absence of statute or contract there is an absolute warranty of seaworthiness and not merely an obligation to use due diligence. The charter party contained an exception against liability for damage arising from perils of the sea. The holding of the case is merely that such an exception does not exonerate the owner from liability for loss or damage resulting from his own negligence. The evidence showed that the damage was caused by sea water which entered the bilge pump hole because of a missing cap. The absence of the cap being the cause, the question was whether that absence was due to negligence of the ship. The evidence showed that the cap had been carried away in circumstances amounting to an ordinary contingency which ought reasonably to have been anticipated—in other words, not a peril of the sea. The cap had been negligently fitted. The defendant thus had failed to show that the loss was due to a cause within the exception of the charter party.

The Thomas P. Beal, 11 Fed. (2d) 49, was a case of damage to barrels of oil resulting from leakage. The ship relied upon a leakage exception in the bill of lading. The court pointed out that on proof that the cause was one covered by an exception of the bill of lading, the burden is upon the cargo owner to prove that negligence "was the efficient cause". The cargo owner claimed that the cause was improper and negligent stowage of the oil in the hottest part of the ship and that the leakage "was due to the excessive heat in the place of stowage" (p. 52), the leakage in the barrels stowed elsewhere on the ship being entirely normal. The claimed unseaworthiness was nothing else than the improper stowage of the oil in the hottest part of the ship. The court pointed out that the question of improper stowage was important only if it was a proximate cause of the damage, and it said:

> "We are of the opinion that this amounted to negligence, which was the proximate cause of the damage, for which * * * the carrier is liable". (p. 51, 2d col.)

It further points out that unseaworthiness is unimportant unless it is a proximate cause:

> "Whose negligence was the efficient cause of the damage? Negligence of the carrier is not actionable unless it caused the damage". (p. 51, 1st col.)

The Benjamin Noble, 232 Fed. 382. The vessel was lost—ship, crew and cargo—during a storm. The cargo owners sought recovery on the theory that the ship was unseaworthy because she was overloaded. The unseaworthiness in question was the direct cause of the loss. Petitioners cite the same case on appeal, 244 Fed. 95. The

evidence having showed that carrier did not exercise due diligence in loading the ship, its negligence being therefore the cause of the loss, the court merely remarked that the bill of lading was no defense, not because of Section 3 of the *Harter Act* but because Section 2 of the Act prohibits a contract which would excuse the carrier from its own negligence.

The Skipsea, 9 Fed. (2d) 887. Here a cargo of onions was damaged in two ways. They were stowed next to a wooden bulkhead separating them from the coal bunkers, and part was damaged by leakage of bilge water through the coal and into the hold through the leaky bulkhead. The proven cause was the unseaworthy bulkhead. Other onions were found smashed as a result of the fact that the cargo had not been shored in place, allowing some of the boxes to fall off and break. The court said:

> "The result of this combination of water mixed with coal dust explains the damage to the onions found in the hold * * * The ship would be liable for damages resulting from this cause."

As to the smashed onions, the court said:

> "The ship has not satisfactorily explained the cause of the damage here, and we are satisfied that the cargo stowed was not properly secured."
>
> * * * * * * *
>
> "The loss through breakage was due to the shifting cargo and this is attributable to the negligent manner of stowing the cargo."

Kaufer Co. v. Luckenbach Steamship Company, 294 Fed. 978, involved damage to candles caused by heat. The

seaworthiness of which the court speaks was proper stowage, i.e., stowage "such as to reasonably fit her to carry the cargo undertaken". The issue was whether the candles were stowed near the engine room or steam pipes or other hot object. Whether the burden of proof on this issue was on the shipper or carrier is unimportant in the present case. The point in the *Kaufer* case is that the unseaworthiness involved was one having a direct causal effect on the damage.

Cafiero & Mencacci v. Navigazione Libera Triestina, S. A., 50 Fed. (2d) 199, involved damage to canned tomatoes which resulted from the fact that cheese had been improperly stowed on top of them and during the voyage melted and ran over the tomatoes. The seaworthiness involved pertained to stowage, over other cargo, of cheese, a material likely to melt. The stowage was held to be negligent and the court found "the damage due to negligence". The unseaworthiness was the direct cause of the damage.

American Co. v. U. S., 26 Fed. (2d) 468. Here shortly after the ship commenced its voyage its steering gear became jammed because of a short and loose key in the steering mechanism, and she became unmanageable, collided with another vessel and sank. The defect in the gear was readily discoverable by due diligence. The specific proved unseaworthiness and the lack of due diligence to make seaworthy were the cause of the loss. Since negligence was the cause, the carrier was liable despite any provision of the bill of lading. We quote (p. 469):

> "There can be no doubt that a loose key in one of the sets of gears connected with the steering mechanism

was the cause of the jamming. * * * This key was short and therefore loose. This defective key must have been apparent if due diligence had been exercised by inspection, as competent and convincing witnesses have testified * * *

* * * * * * *

"Respondent also contends that there is no causal connection between the unseaworthiness of the ship and the loss. The collision was due solely to the fact that the ship was unmanageable practically from the start, owing to the defective jammed steering gear. * * * (p. 470, 1st col.)

* * * * * * *

"The respondent offers no explanation of the jamming of the wheel, but seems to be content to rest on the position that the collision was inevitable accident. But the cause of the collision is known; i.e., the defective (unseaworthy) steering gear, undiscovered owing to failure of the owner to exercise due diligence. The resultant damage to cargo is the logical sequence" (p. 470, 2d col.)

It will be noted that the carrier itself offered no explanation of the jamming, whereas in the present case the respondent fully proved the cause of the loss. The case does not hold that in order to rely on a bill of lading exception the carrier must prove seaworthiness with respect to matters not causally connected with the damage. It is only another illustration of the conceded rule that a carrier always is liable for loss resulting from its negligence.

Blake, Moffitt & Towne v. Steamship Co., 120 Cal. App. (Supp.) 775, was a decision of the appellate division of

the Superior Court (nisi prius court) of San Francisco on appeal from the Municipal Court and involved a defense under Section 3 of the *Harter Act*. The words "bill of lading" appear in the passage quoted on page 21 of the petition as dictum unsupported by any authority.